

1993

State of Utah v. Russell Catalano : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
	:	KET NO <u>930678 CA</u>
Plaintiff/Appellee,	:	Case No. 930678-CA
v.	:	
RUSSELL CATALANO	:	Priority 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM THE TRIAL COURT'S RESTITUTION ORDER BASED ON DEFENDANT'S GUILTY PLEA TO THREE BURGLARY COUNTS (ONE SECOND DEGREE FELONY AND TWO THIRD DEGREE FELONIES), PURSUANT TO UTAH CODE ANN. § 76-6-202 (1990), AND TO THREE THEFT COUNTS (ONE SECOND DEGREE FELONY, ONE THIRD DEGREE FELONY, AND ONE CLASS A MISDEMEANOR), PURSUANT TO § 76-6-404 (1990), IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE LYNN W. DAVIS, PRESIDING.

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FILED
Utah Court of Appeals

OCT 04 1994

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Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellee,	:	Case No. 930678-CA
v.	:	
RUSSELL CATALANO	:	Priority 2
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930678-CA
v.	:	
RUSSELL CATALANO	:	Priority 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant appeals the trial court's restitution order entered on his guilty pleas to three burglary counts (one second degree felony and two third degree felonies), pursuant to Utah Code Ann. § 76-6-202 (1990), and to three theft counts (one second degree felony, one third degree felony, and one class A misdemeanor), pursuant to § 76-6-404 (1990). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(f) (Supp. 1994).

STATEMENT OF ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Where defendant never objected to imposing complete restitution, has he preserved his claim that the trial court failed to consider certain statutory factors relevant only to determining whether to impose complete, partial, or nominal restitution? Because defendant did not object to imposing complete restitution, he has waived this claim. State v. Snyder, 747 P.2d 417, 421 (Utah 1987).

2. Does the record contain sufficient evidence to support two of the restitution amounts set by the trial court? Defendant has neither marshalled the evidence supporting the trial court's determination of the amounts nor shown how the evidence fails to support them, precluding review of this claim on its merits. State v. Gray, 851 P.2d 1217, 1225 (Utah App.), cert. denied, 860 P.2d 943 (Utah 1993).

3. Did the trial court properly set the restitution amount for three items defendant stole at their original purchase price rather than at their fair market value where there was no evidence of their fair market value? This Court will not disturb the trial court's restitution order unless the trial court exceeded its legal authority or abused its discretion. State v. Twitchell, 832 P.2d 866, 868 (Utah App. 1992) (citations omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains the text of the relevant constitutional provisions, statutes, and rules.

STATEMENT OF THE CASE

The State charged defendant with one second degree felony burglary count, eight third degree felony burglary counts, five second degree felony theft counts, three third degree felony theft counts, and one class A misdemeanor theft count, pursuant to Utah Code Ann. §§ 76-6-202 (1990) and 76-6-404 (1990) (R. 1-4). Defendant pleaded guilty to the first six of the eighteen counts charged against him: three burglary counts (one second

degree felony and two third degree felonies), and three theft counts (a second degree felony, a third degree felony, and a class A misdemeanor) (R. 47-48). The State moved to dismiss the other twelve counts and sought complete restitution on all of the charged counts (R. 36, 40, 138).

The trial court sentenced defendant as follows:

1. Counts I and V (third degree felony burglaries) and Count II (third degree felony theft): to serve an indeterminate prison term of 0-5 years on each count and to pay a fine of \$5,000 on each count;

2. Count III (second degree felony burglary) and Count VI (second degree felony theft): to serve an indeterminate prison term of 1-15 years on each count and to pay a fine of \$10,000 on each count;

3. Count IV (class A misdemeanor theft): to serve a one year prison term and to pay a fine of \$2,500

(R. 55-56). The trial court suspended execution of the sentence and placed defendant on probation for a period of thirty-six months upon certain terms and conditions, including that defendant pay restitution (R. 55).

On August 17, 1993, the trial court held a restitution hearing during which it heard evidence about the amount of each victim's loss and determined a restitution amount for each victim (Tr. Aug. 17, 1993). The trial court entered an order dated November 3, 1993 setting forth the amounts imposed, which totalled \$15,844 (R. 112-114).

STATEMENT OF FACTS

During February, March, and April of 1992, defendant and co-defendant, Daniel J. Centano, stole property consisting primarily of tools, painting equipment, and other equipment used in home construction (R. 1-4; Tr. Aug. 17, 1993 at 6-7, 9, 13-14, 25-28, 33-34, 70-72, 91-92). Defendant and co-defendant stole the property in part to equip their own business, C & C Painting (Tr. Aug 17, 1993 at 56-57).

Additional facts are recited in the argument sections to which they are relevant.

SUMMARY OF THE ARGUMENT

1. Failure to consider statutory factors. Defendant claims this Court should reverse the trial court's restitution order because the trial court failed to consider his financial resources and the burden restitution would impose on his family. However, the plain language of the statute requires the court to consider those factors only when determining whether to order complete, partial, or nominal restitution. Defendant never objected to the State's representations that he had agreed to pay complete restitution, and all of the objections he made during the restitution hearing went to the proper calculation of property value, not to whether he should pay something less than complete restitution. Therefore, defendant has waived this claim.

2. Sufficiency of the evidence. Defendant complains that the record contains insufficient evidence to support two of the

restitution amounts set by the trial court. However, defendant has neither marshalled the evidence supporting the court's determination nor shown how the marshalled evidence fails to justify it. Therefore, defendant has failed to meet his appellate burden to succeed on this claim.

3. Calculation of restitution. Defendant claims that the trial court improperly ordered him to pay restitution for paint sprayers he stole from victim Richard Valgardson at the amount Mr. Valgardson paid to purchase them originally, arguing that the trial court could not order him to pay anything other than their fair market value. The sprayers' original purchase price and their replacement cost comprised the only evidence of their value. Defendant offered no evidence of their fair market value. Therefore, the trial court properly exercised its discretion to set the restitution amount for the sprayers at the lower original purchase price.

ARGUMENT

INTRODUCTION

Pursuant to the parties' stipulation and this Court's order, defendant supplemented the record and filed a "supplemental" brief. However, defendant's supplemental brief contains all of the arguments in the original brief, and therefore appears to be a replacement brief. Therefore, the State will refer to and address only the points raised defendant's second brief.

POINT I

BECAUSE DEFENDANT NEVER OBJECTED TO IMPOSITION OF COMPLETE RESTITUTION, HE CANNOT COMPLAIN THAT THE TRIAL COURT FAILED TO CONSIDER FACTORS RELEVANT ONLY TO DETERMINING WHETHER TO IMPOSE COMPLETE, PARTIAL, OR NOMINAL RESTITUTION

Defendant first claims that the trial court failed to consider his financial resources and the burden restitution would impose on him even though Utah Code Ann. § 76-3-201(4)(c) (Supp. 1993) required the court to do so. Appellant's Brief at 6-7.¹ By its plain language, the restitution statute requires the trial court to consider those factors in determining whether to order restitution, and whether to order complete, partial, or nominal restitution. Utah Code Ann. § 76-3-201(4)(a)(ii) & (4)(c)(i)-(iv) (Supp. 1993). The statute does not require the court to consider those factors when calculating the amount that constitutes complete restitution.

The State represented to the trial court that it would seek full restitution (R. 138) and that defendant had agreed to pay full restitution as part of the plea bargain (Tr. August 17, 1993 at 5-6). Defendant neither objected to these representations nor otherwise claimed that he had agreed to pay something other than

¹ Defendant has relied on the version of § 76-3-201 contained in the main volume of the code, ignoring that that section was amended in 1992 and 1993. The 1993 amendments became effective on July 1, 1993, after defendant was sentenced, but before the trial court held the restitution hearing and entered its order setting the amount of restitution. 1993 Utah Laws ch. 17, §1. Although the statutory language relevant to defendant's claims is unchanged, the particular subsections where that language appears have been reorganized. The State will cite to the controlling (post July 1, 1993) version of the statute.

complete restitution.² At the restitution hearing, defendant's objections went to the proper valuation of some of the stolen property, whether the State had properly supported some of the amounts claimed, and whether the restitution statute permitted ordering restitution for some of the kinds of losses claimed (id. at 21-23, 46-47, 63-66, 68, 80, 86-87, 95-96, 102, 104-105). None of these objections has any relationship to defendant's ability to pay. Defendant objected only to how to calculate complete restitution, not to whether the court should order something less than complete restitution.

Because the factors defendant now complains the trial court failed to consider concern only whether to order complete, partial, or nominal restitution, and because defendant acquiesced in ordering complete restitution, he has not preserved this claim. Therefore, he cannot rely on it as a basis for reversal. State v. Snyder, 747 P.2d 417, 421 (Utah 1987) (the defendant

² The closest defendant came to making such a statement came near the end of the restitution hearing, when he stated he understood the plea agreement required him to pay only one-half of the restitution. However, when the trial court explained that there may be joint and several liability with co-defendant but that that did not "exonerate [defendant] for the damages to these victims," neither defendant nor defendant's counsel made any further comment (Tr. Aug. 17, 1993 at 115-16). The trial court's comment, along with the statements by the prosecutor established that defendant had agreed to pay complete restitution, and neither defense counsel nor defendant requested that the court order something less than complete restitution. Furthermore, the record rebuts defendant's belated statement that he thought he would be responsible for only one-half of the restitution. In a pre-hearing letter to the court, defendant acknowledged his responsibility to pay restitution of approximately \$13,000, the amount at which complete restitution had been calculated prior to the hearing (R. 89).

waived any challenge to the trial court's failure to enter written findings on its restitution order by lodging no objection to imposition, amount, or distribution of the restitution ordered).

POINT II

DEFENDANT HAS NEITHER MARSHALLED THE EVIDENCE
SUPPORTING THE TRIAL COURT'S RESTITUTION CALCULATIONS
NOR SHOWN THAT THE MARSHALLED EVIDENCE FAILS TO SUPPORT
THE AMOUNTS AWARDED

Defendant describes Point II of the brief as a challenge to the sufficiency of the trial court's findings to support its "findings of restitution." However, the substance of the argument does not address the sufficiency of the findings at all. Rather, defendant makes two claims in Point II: 1) that restitution amounts ordered for victim Richard Valgardson's stolen paint sprayers fall outside the statutory definition of the "pecuniary damages" the trial court had the authority to award; and 2) that some of the amounts calculated lack support in the evidence. Appellant's Brief at 7-8.³

³ If defendant had challenged the sufficiency of the findings themselves, that claim would have failed for two reasons. First, defendant failed to challenge the sufficiency of the findings below; therefore, he has waived it for purposes of appeal. State v. Labrum, 246 Utah Adv. R. 11, 14-15 (Utah App. 1994) (the defendant could not challenge the trial court's lack of written findings to support his sentence enhancement where he did not challenge the lack of findings in the trial court). Second, the statute requires the court to state its reasons supporting its determination that restitution is appropriate or inappropriate; it does not require the court to justify on the record the reasons for setting each dollar amount. Utah Code Ann. § 76-3-201(4)(d)(i) (Supp. 1993).

The first claim simply repeats the claim defendant raises in Point III of his brief (that the court exceeded its sentencing authority); the State addresses that claim in Point III of this brief. In the second claim, defendant alleges that the evidence does not support the following restitution amounts ordered: 1) \$3,000 for Mr. Valgardson's losses from down-time due to defendant's theft of his paint sprayers; and 2) \$1,000 for Ray Hernandez's losses on the subcontracting jobs he could not perform as a result of defendant's theft of his equipment.

In order to succeed on a challenge to the sufficiency of the evidence supporting a trial court determination, defendant has the appellate burden to marshal all of the evidence supporting that determination, then to show how the marshalled evidence fails to support it. State v. Gray, 851 P.2d 1217, 1225 (Utah App.) (considering a sufficiency challenge in the context of a trial court's denial of the defendant's motion to dismiss), cert. denied, 860 P.2d 943 (Utah 1993); State v. Drobek, 815 P.2d 724, 734 (Utah App.) (considering a sufficiency challenge to a trial court's determination that defendant had made a knowing and intelligent waiver of his right to representation), cert. denied, 836 P.2d 1383 (Utah 1991). Defendant has done neither.

Mr. Valgardson used the paint sprayers to paint houses in his modular home manufacturing business (Tr. Aug. 17 1993 at 32-33). The business operated on an assembly line with production volume contributing to profits (id. at 42-43). Mr. Valgardson had between eighteen and twenty-six homes in various stages of

production at any give time, and it cost him approximately \$23,000 per day to operate his business (id. at 35, 40-41). Using the paint sprayers, his painters could paint a house in two hours (id. at 41). After defendant stole the sprayers, Mr. Valgardson's painters had to use rollers and brushes to paint the houses, increasing the painting time to six to eight hours per house (id.). This delay affected other manufacturing processes; for example, the framers could not start as many houses and the electricians could not wire them (id. at 41-43). Mr. Valgardson replaced one of the three sprayers defendant stole within one week of the theft, and the other two within six weeks, when his cash flow permitted (id. at 37, 40-41).

Mr. Valgardson admitted that he could not state with certainty how much money he lost as a result of the delays the stolen sprayers caused; however, he gave a "conservative" estimate of \$6,000 to \$10,000 (id. at 42-43). The trial court acknowledged that Mr. Valgardson could only estimate the amount of his down-time losses, but also acknowledged that he had obviously suffered such losses (id. at 66-68). Therefore, the court ordered \$3,000 restitution for the down-time losses, only fifty percent of Mr. Valgardson's conservative low estimate (id. at 67-68).

Victim Ray Hernandez could not appear at the restitution hearing (id. at 90). According to his wife, Mr. Hernandez's losses included lost earnings from subcontracting jobs that he could not perform without the equipment defendant stole from him.

Ms. Hernandez knew of three subcontracting jobs her husband turned down because he did not have the equipment to do them and that he made \$1,700 to \$2,000 per job (id. at 94, 97). She also knew that he usually had about one such job per month (id. at 97). However, she testified that she did not know how many subcontracting jobs her husband could have found during the year between the time defendant stole her husband's equipment and the time her husband replaced it, and therefore she did not know her husband's total losses for that period (id. at 94). The court awarded \$1,000 for the profits Mr. Hernandez's lost from the subcontracting jobs he could not obtain (id. at 117).

Defendant marshals none of this evidence. This failure alone precludes reversal based on his insufficiency claim. State v. Gray, 851 P.2d at 1225.

Defendant also fails to show that the evidence was insufficient to support the amounts ordered for Mr. Valgardson's down-time and Mr. Hernandez's lost subcontracting jobs. As to Mr. Valgardson's down-time losses, defendant complains only that Mr. Valgardson "speculated" about the amount. However, defendant provides no legal authority or analysis to establish that Mr. Valgardson's conservative estimate cannot independently support the restitution award or what quantum of proof was necessary. Id.; State v. Yates, 834 P.2d 599, 602 (Utah App. 1992) (refusing to reach the merits of an argument unsupported by legal authority or analysis). Cf. Fee v. State, 656 P.2d 1202, 1205-1206 (Alaska App. 1982) (the trial court could rely on victim's testimony

about the amount of his losses absent any contradictory evidence).

Similarly, defendant complains about the restitution amounts ordered for Mr. Hernandez's lost subcontracting jobs because, according to defendant, Ms. Hernandez testified that did not know the amount of this loss. Appellant's Brief at 8. However, the testimony on which defendant relies referred only to her husband's subcontracting losses for the entire year (id. at 94). She had personal knowledge of at least three jobs her husband turned down as a result of defendant's theft of his equipment; she also knew his subcontracting jobs usually \$1,700 to \$2,000 (id. at 94, 97). Therefore, she had personal knowledge of \$5,100 to \$6,000 in lost earnings defendant's theft caused. This testimony more than amply supports the trial court's \$1,000 restitution order for those losses.⁴

In sum, defendant has neither marshalled the evidence supporting the amounts the court ordered in restitution nor shown how the marshalled evidence is insufficient to support those amounts. Therefore, he has not met his appellate burden to succeed on this claim.

⁴ If anything, the trial court ordered only partial restitution for Mr. Valgardson's down time and Mr. Hernandez's lost subcontracting jobs.

POINT III

THE TRIAL COURT REASONABLY EXERCISED ITS DISCRETION IN ORDERING DEFENDANT TO PAY RESTITUTION IN THE AMOUNT OF THE ORIGINAL PURCHASE PRICE OF STOLEN PROPERTY⁵

Defendant next claims that the trial court exceeded its statutory sentencing authority by imposing restitution for the "cost" to Mr. Valgardson of three "new" paint sprayers, when the three sprayers defendant stole from him were used. Appellant's Brief at 7-8. In substance, defendant claims the court could only require him to pay restitution based on the fair market value of the sprayers. Appellant's Brief at 8.

Mr. Valgardson paid \$5,935.04 when he originally purchased the sprayers and paid approximately \$7,500 to replace them (Tr. Aug. 17, 1993 at 33-38). Because there is a very limited market for sprayers, Mr. Valgardson could not state a fair market price for sprayers of a similar age and model (id. at 35-36). Defendant offered no evidence of the sprayers' fair market value.⁶ The trial court ordered defendant to pay the original purchase price (\$5,935.04) for the sprayers.

⁵ In Point III of his brief, defendant also claims that trial court abused its sentencing discretion by failing to consider his financial situation and the burden restitution would impose on him. For the reasons argued in Point I, defendant relieved the court of that obligation by agreeing or at least not objecting to the imposition of complete restitution.

⁶ One of the other victims testified he believed a used sprayer would sell for approximately \$1,500, but the record contains no detail to establish that he was speaking of sprayers similar to those defendant stole from Mr. Valgardson (Tr. August 17, 1993 at 30).

The restitution statute required the trial court to order restitution in an amount up to double the victims' "pecuniary damages," and defines "pecuniary damages" as "all special damages . . . which a person could recover against defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities" Utah Code Ann. § 76-3-201(4)(a)(i) and (1)(c) (Supp. 1993).

In State v. Twitchell, 832 P.2d 866 (Utah App. 1992), this Court analogized a theft by deception to a conversion of the property taken and used that theory to review the trial court's restitution award. Id. at 869-70.⁷ As this Court noted, damages in a conversion action are calculated on the "full value" of the property. Id. at 870. However, "full value" does not always equate to fair market value. To the contrary, a trial court may rely on other evidence to determine value, such as the original purchase price or the replacement cost. Lym v. Thompson, 184 P.2d 667, 669-70 (Utah 1947) (in a conversion action for stolen pipe, the supreme court rejected the defendant's claim that the trial court should have limited the plaintiff's recovery to a published ceiling price for used pipe, and affirmed the trial court's reliance on the original purchase price). See generally Dan Dobbs, Remedies, § 5.12 (1973).

The record contains only two figures to establish the sprayers' value: the original purchase price and the higher

⁷ Defendant misreads the outcome of Twitchell. Contrary to his argument, this Court affirmed the restitution award. Id. at 868.


replacement cost.⁸ Either amount is a proper measure of their value, and well within the double damages limit in the restitution statute. Therefore, the trial court reasonably exercised its discretion when it selected the lower of the only two amounts offered to establish the sprayers' value.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's restitution award.

RESPECTFULLY SUBMITTED this 4th day of October,
1994.

JAN GRAHAM
Attorney General


THOMAS BRUNKER
Assistant Attorney General

⁸ The only evidence defendant presented was the amount he received when he pawned the sprayers; however, he admitted that this did not represent their fair market value (Tr. August 17, 1993 at 53-55).

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed, postage prepaid, to the following on this 4th day of October, 1994:

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Thomas B. Barker

ADDENDUM A

CHAPTER 3

PUNISHMENTS

Part 2		Section	
Sentencing		76-3-206.	Capital felony — Penalties.
		76-3-207.	Capital felony — Sentencing proceeding.
Section 76-3-201.	Sentences or combination of sentences allowed — Civil penalties — Restitution — Hearing — Definitions — Resentencing — Aggravation or mitigation of crimes with mandatory sentences.	76-3-207.5.	Applicability — Effect on sentencing — Options of offenders.
Part 3			
Fines and Special Sanctions			
76-3-201.2.	Civil action by victim for damages	76-3-301.	Fines of persons.
Part 4			
Limitations and Special Provisions on Sentences			
76-3-203.1.	Offenses committed by three or more persons — Enhanced penalties.	76-3-402.	Conviction of lower degree of offense.
76-3-203.2.	Definitions — Use of firearm in offenses committed on or about school premises — Enhanced penalties.	76-3-404.	Presentence investigation and diagnostic evaluation — Commitment of defendant — Sentencing procedure.
76-3-203.3.	Penalty for hate crimes — Civil rights violation.		

PART 2

SENTENCING

76-3-201. Sentences or combination of sentences allowed — Civil penalties — Restitution — Hearing — Definitions — Resentencing — Aggravation or mitigation of crimes with mandatory sentences.

(1) As used in this section:

(a) "Conviction" includes a:

- (i) judgment of guilt; and
- (ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including insured damages, and payment for expenses to a governmental entity for extradition or transportation.

(e) (i) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal from or disqualification of public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) to life imprisonment;

(f) on or after April 27, 1992, to life in prison without parole; or

(g) to death.

(3) (a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

(iv) permit removal of a person from office;

(v) cite for contempt; or

(vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4) (a) (i) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution up to double the amount of pecuniary damages to the victim or victims of the offense of which the defendant has been convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court.

(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (c).

(b) (i) When a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(ii) In determining whether restitution is appropriate, the court shall consider the criteria in Subsection (c).

(c) In determining whether or not to order restitution, or restitution that is complete, partial, or nominal under this subsection, the court shall take into account:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

- (iv) other circumstances which the court determines make restitution inappropriate.
- (d) (i) When the court determines that restitution is appropriate or inappropriate under this subsection, the court shall make the reasons for the decision a part of the court record.
 - (ii) The court shall send a copy of its order of restitution to the Division of Finance.
- (e) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall at the time of sentencing allow him a full hearing on the issue.
- (5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:
 - (i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;
 - (ii) charged with a felony or a class A, B, or C misdemeanor; and
 - (iii) convicted of a crime.
- (b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:
 - (i) the defendant is charged with an infraction or on a subsequent failure to appear warrant issued for an infraction;
 - (ii) the defendant was not transported pursuant to a court order.
- (c) (i) Restitution of governmental transportation expenses under Subsection (a)(i) shall be calculated according to the following schedule:
 - (A) \$75 for up to 100 miles a defendant is transported;
 - (B) \$125 for 100 up to 200 miles a defendant is transported;
 - (C) \$250 for 200 miles or more a defendant is transported.
- (ii) The schedule of restitution under Subsection (i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.
- (6) (a) If a statute under which the defendant was convicted mandates that one of three stated minimum terms shall be imposed, the court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.
- (b) Prior to or at the time of sentencing, either party may submit a statement identifying circumstances in aggravation or mitigation or presenting additional facts. If the statement is in writing, it shall be filed with the court and served on the opposing party at least four days prior to the time set for sentencing.
- (c) In determining whether there are circumstances that justify imposition of the highest or lowest term, the court may consider the record in the case, the probation officer's report, other reports, including reports received under Section 76-3-404, statements in aggravation or mitigation submitted by the prosecution or the defendant, and any further evidence introduced at the sentencing hearing.
- (d) The court shall set forth on the record the facts supporting and reasons for imposing the upper or lower term.
- (e) The court in determining a just sentence shall consider sentencing guidelines regarding aggravation and mitigation promulgated by the Commission on Criminal and Juvenile Justice.

- (7) (a) (i) If a defendant subject to Subsection (6) has been sentenced and committed to the Utah State Prison, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the Board of Pardons, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he had not previously been sentenced, so long as the new sentence is no greater than the initial sentence nor less than the mandatory time prescribed by statute.
- (ii) The resentencing provided for in this section shall take into consideration the sentencing guidelines established under this section by the Commission on Criminal and Juvenile Justice to eliminate disparity of sentences and to promote uniformity of sentencing.
- (iii) Credit shall be given for time served.
- (b) (i) The court shall state the reasons for its sentence choice on the record at the time of sentencing.
- (ii) The court shall also inform the defendant as part of the sentence that if the defendant is released from prison he may be on parole for a period of ten years.
- (c) If during the commission of a crime described as child kidnapping, rape of a child, object rape of a child, sodomy upon a child, or sexual abuse of a child, the defendant causes substantial bodily injury to the child, and if the charge is set forth in the information or indictment and admitted by the defendant, or found true by a judge or jury at trial, the defendant shall be sentenced to the aggravated mandatory term in state prison. This subsection takes precedence over any conflicting provision of law.

History: C. 1953, 76-3-201, enacted by L. 1973, ch. 196, § 76-3-201; 1979, ch. 69, § 1; 1981, ch. 59, § 1; 1983, ch. 85, § 1; 1983, ch. 88, § 3; 1984, ch. 18, § 1; 1986, ch. 156, § 1; 1987, ch. 107, § 1; 1990, ch. 81, § 1; 1992, ch. 142, § 1; 1993, ch. 17, § 1.

Amendment Notes. — The 1990 amendment, effective April 23, 1990, substituted "consider sentencing guidelines" for "be guided by sentencing rules" and "Commission on Criminal and Juvenile Justice" for "Judicial Council" in Subsection (5)(e); substituted "take into consideration the sentencing guidelines established under this section by the Commission on Criminal and Juvenile Justice" for "comply with the sentencing rules of the Judicial Council" in the second sentence in Subsection (6)(a); and made stylistic and punctuation changes.

The 1992 amendment, effective April 27, 1992, added Subsections (1)(e) and (f) and redesignated former Subsection (1)(e) as (1)(g); subdivided Subsection (4)(d); substituted

"takes precedence over" for "supersedes" in Subsection (6)(c); and made stylistic changes throughout the section.

The 1993 amendment, effective July 1, 1993, added Subsection (1), redesignating the following subsections accordingly; subdivided Subsection (3); substituted present Subsection (4)(a)(ii) for former language requiring the court to consider the criteria in Subsection (3)(b) and to make the reasons for its decision a part of the court record; deleted language relating to transportation of a defendant from Subsection (4)(b)(i); substituted "Subsection (c)" for "Subsection (3)(b)" and deleted two sentences now comprising Subsection (4)(d) in Subsection (4)(b)(ii); inserted "under this subsection" in Subsections (4)(c) and (4)(d); deleted former Subsection (4), defining terms; added Subsection (5); subdivided Subsections (7)(a) and (7)(b); and made stylistic changes.

Cross-References. — Commission on Criminal and Juvenile Justice, § 63-25-1 et seq.

COLLATERAL REFERENCES

Am. Jur. 2d. — 52 Am Jur 2d Malicious Mischief § 1

C.J.S. — 54 C J S Malicious or Criminal Mischief or Damage to Property § 3

Key Numbers. — Malicious Mischief ⇐ 1

PART 2**BURGLARY AND CRIMINAL TRESPASS****76-6-201. Definitions.**

For the purposes of this part:

(1) "Building," in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:

(a) Each separately secured or occupied portion of the structure or vehicle; and

(b) Each structure appurtenant to or connected with the structure or vehicle.

(2) "Dwelling" means a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present.

(3) A person "enters or remains unlawfully" in or upon premises when the premises or any portion thereof at the time of the entry or remaining are not open to the public and when the actor is not otherwise licensed or privileged to enter or remain on the premises or such portion thereof.

(4) "Enter" means:

(a) Intrusion of any part of the body; or

(b) Intrusion of any physical object under control of the actor.

History: C. 1953, 76-6-201, enacted by L. 1973, ch. 196, § 76-6-201.

Cross-References. — Civil provisions, entry and detainer, § 78-36-1

COLLATERAL REFERENCES

Am. Jur. 2d. — 13 Am Jur 2d Burglary § 1

C.J.S. — 12A C J S Burglary § 2.

A.L.R. — Maintainability of burglary charge, where entry into building is made with consent, 58 A L R 4th 335

What is "building" or "house" within burglary or breaking and entering statute, 68 A L R 4th 425

Key Numbers. — Burglary ⇐ 1

76-6-202. Burglary.

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

COLLATERAL REFERENCES

Am. Jur. 2d. — 50 Am Jur 2d Larceny § 10 session of stolen goods to support inference of burglary or other felonious taking, 51 A L R 3d 727
C.J.S. — 52A C J S Larceny § 4
A.L.R. — What amounts to "exclusive" possession. — Larceny ¶ 12.

76-6-403. Theft — Evidence to support accusation.

Conduct denominated theft in this part constitutes a single offense embracing the separate offenses such as those heretofore known as larceny, larceny by trick, larceny by bailees, embezzlement, false pretense, extortion, blackmail, receiving stolen property. An accusation of theft may be supported by evidence that it was committed in any manner specified in Sections 76-6-404 through 76-6-410, subject to the power of the court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

History: C. 1953, 76-6-403, enacted by L. 1973, ch. 196, § 76-6-403; 1974, ch. 32, § 17.

NOTES TO DECISIONS

ANALYSIS

Evidence
 Pleading and practice
 Receiving stolen property

Evidence.

Fingerprint evidence, based on a comparison of defendant's fingerprints with those found at the scene of the crime, along with the testimony of defendant's accomplice, was sufficient evidence to find defendant guilty of burglary and theft. State v Bailey, 712 P 2d 281 (Utah 1985)

Pleading and practice.

Section 76-6-404 is the "general offense of

theft" required to be pled by this section to invoke the provisions of consolidated theft. Once the prosecution charges a defendant with the general offense of "theft" under § 76-6-404, it may then present its evidence to prove the theft was committed in any manner specified in §§ 76-6-404 to 76-6-410. State v Fowler, 745 P 2d 472 (Utah Ct App 1987)

Receiving stolen property.

Evidence that establishes receiving stolen property under § 76-6-408 is sufficient to sustain a conviction of theft without the necessity of establishing theft by taking. State v Taylor, 570 P 2d 697 (Utah 1977)

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

History: C. 1953, 76-6-404, enacted by L. 1973, ch. 196, § 76-6-404.

Cross-References. — Motor vehicles, special anti-theft laws, §§ 41-1-105 to 14-1-121 Shoplifting Act, § 78-11-14 et seq

tional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and
- (d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court. 1988

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) appeals from the circuit courts, except those from the small claims department of a circuit court;
- (e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;
- (f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;
- (g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;
- (h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the

Board of Pardons and Parole except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings. 1994

78-2a-4. Review of actions by Supreme Court.

Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court. 1986

78-2a-5. Location of Court of Appeals.

The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state. 1986

CHAPTER 3

DISTRICT COURTS

Section

- 78-3-1 to 78-3-2. Repealed.
- 78-3-3. Term of judges — Vacancy.
- 78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals — Jurisdiction when circuit and district court merged.
- 78-3-5. Repealed.
- 78-3-6. Terms — Minimum of once quarterly.
- 78-3-7 to 78-3-11. Repealed.
- 78-3-11.5. State District Court Administrative System.
- 78-3-12. Repealed.
- 78-3-12.5. Costs of system.
- 78-3-13. Repealed.
- 78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.
- 78-3-13.5, 78-3-14. Repealed.
- 78-3-14.5. Allocation of district court fees and fines.
- 78-3-15 to 78-3-17. Repealed.
- 78-3-17.5. Application of savings accruing to counties.
- 78-3-18. Judicial Administration Act — Short title.
- 78-3-19. Purpose of act.
- 78-3-20. Definitions.
- 78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.
- 78-3-21.5. Data bases for judicial boards.
- 78-3-22. Presiding officer — Compensation — Duties.
- 78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.
- 78-3-24. Court administrator — Powers, duties, and responsibilities.